

AMENDED IN SENATE APRIL 14, 2004

SENATE BILL

No. 1892

Introduced by Senator Burton

March 3, 2004

An act to amend Section ~~19131~~ of, and to repeal Section ~~19132~~ *19130* of, and to repeal and add Sections *19131 and 19132* of, the Government Code, and to repeal and add Section *10337* of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1892, as amended, Burton. Personal service contracts.

Existing law permits state agencies to enter into specified personal services contracts to achieve cost savings when certain conditions are met. Among these conditions is a requirement that a state agency that proposes to enter into such a contract notify the State Personnel Board of its intention to do so. Upon receipt of this notification, the board is required to notify organizations that represent state employees that perform the types of work described in the contract. These organizations may request the board to review the proposed contract to determine whether the purpose of entering into the personal services contract is to achieve cost savings.

Existing law also authorizes state agencies to enter into other types of personal services contracts, including an urgent personal service contract, as specified, without notifying the board of its intention to do so. An employee organization that represents state employees may request the board to determine whether these types of contracts are permitted by law.

~~This bill would repeal the provision of law of law that authorizes an employee organization that represents state employees to request the~~

~~board to determine whether a proposed personal service contract, of a type that the state agency is not required to notify the board of its intention to enter into, is permitted by law.~~

~~This bill would also make technical, nonsubstantive changes to existing law.~~

This bill would require these types of contracts to contain a provision stating that, in the event the board determines that the contract is not in compliance with the requirements that apply to personal services contracts, the contract will be terminated and the contractor will be liable for a penalty equal to the amount paid by the state agency to the subcontractor prior to the termination of the contract.

This bill would revise and recast current provisions to require a state agency that proposes to execute any type of the specified personal service contracts, except urgent personal services contracts, to notify the board of its intention to do so, and to provide to the board a written justification for the contract. This bill would require the board to transmit copies of the notice and written justification to organizations that represent state employees that perform the types of work described in the contract, and authorize these organizations to request that the board determine whether the contract is a permissible personal services contract. This bill would prohibit any expenditure of money or any work from being performed under these types of contracts until the board has approved or disapproved the contract.

This bill would exempt from these notice and justification requirements urgent personal services contracts, but would authorize an employee organization that represents state employees to request the board to determine whether these types of contracts are permitted under law. If a contract of this type is being performed or has been performed, and the board subsequently disapproves the contract, this bill would authorize any person to bring a court action to recover for the state's General Fund any money paid to the contractor under the contract.

This bill would also authorize the board to review any of these specified personal services contracts, if the board has reason to believe that the contract is not permitted by law.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1.—Section 19131 of the Government Code is~~
2

1 SECTION 1. Section 19130 of the Government Code is
2 amended to read:

3 19130. The purpose of this article is to establish standards for
4 the use of personal services contracts.

5 (a) Personal services contracting is permissible to achieve cost
6 savings when all the following conditions are met:

7 (1) The contracting agency clearly demonstrates that the
8 proposed contract will result in actual overall cost savings to the
9 state, provided that:

10 (A) In comparing costs, there shall be included the state's
11 additional cost of providing the same service as proposed by a
12 contractor. These additional costs shall include the salaries and
13 benefits of additional staff that would be needed and the cost of
14 additional space, equipment, and materials needed to perform the
15 function.

16 (B) In comparing costs, ~~there shall not be included~~ the state's
17 indirect overhead costs *may not be included*, unless these costs can
18 be attributed solely to the function in question and would not exist
19 if that function was not performed in state service. Indirect
20 overhead costs shall mean the pro rata share of existing
21 administrative salaries and benefits, rent, equipment costs,
22 utilities, and materials.

23 (C) In comparing costs, there shall be included in the cost of a
24 contractor providing a service any continuing state costs that
25 would be directly associated with the contracted function. These
26 continuing state costs shall include, but not be limited to, those for
27 inspection, supervision, and monitoring.

28 (2) Proposals to contract out work ~~shall~~ *may* not be approved
29 solely on the basis that savings will result from lower contractor
30 pay rates or benefits. Proposals to contract out work shall be
31 eligible for approval if the contractor's wages are at the industry's
32 level and do not significantly undercut state pay rates.

33 (3) The contract does not cause the displacement of civil
34 service employees. The term "displacement" includes layoff,
35 demotion, involuntary transfer to a new class, involuntary transfer
36 to a new location requiring a change of residence, and time base
37 reductions. Displacement does not include changes in shifts or
38 days off, nor does it include reassignment to other positions within
39 the same class and general location.

1 (4) The contract does not adversely affect the state's
2 affirmative action efforts.

3 (5) The savings shall be large enough to ensure that they will
4 not be eliminated by private sector and state cost fluctuations that
5 could normally be expected during the contracting period.

6 (6) The amount of savings clearly justify the size and duration
7 of the contracting agreement.

8 (7) The contract is awarded through a publicized, competitive
9 bidding process.

10 (8) The contract includes specific provisions pertaining to the
11 qualifications of the staff that will perform the work under the
12 contract, as well as assurance that the contractor's hiring practices
13 meet applicable nondiscrimination, affirmative action standards.

14 (9) *The contract provides that in the event the State Personnel*
15 *Board determines that the contract is not in compliance with the*
16 *provisions of this section, the contract shall be terminated and the*
17 *contractor shall be liable for a penalty equal to the amount paid*
18 *by the state agency to the subcontractor prior to the termination*
19 *of the contract.*

20 (10) The potential for future economic risk to the state from
21 potential contractor rate increases is minimal.

22 ~~(10)~~

23 (11) The contract is with a firm. A "firm" means a corporation,
24 partnership, nonprofit organization, or sole proprietorship.

25 ~~(11)~~

26 (12) The potential economic advantage of contracting is not
27 outweighed by the public's interest in having a particular function
28 performed directly by state government.

29 (b) Personal services contracting also shall be permissible
30 when any of the following conditions can be met:

31 (1) The functions contracted are exempted from civil service
32 by Section 4 of Article VII of the California Constitution, which
33 describes exempt appointments.

34 (2) The contract is for a new state function and the Legislature
35 has specifically mandated or authorized the performance of the
36 work by independent contractors.

37 (3) The services contracted are not available within civil
38 service, cannot be performed satisfactorily by civil service
39 employees, or are of such a highly specialized or technical nature

1 that the necessary expert knowledge, experience, and ability are
2 not available through the civil service system.

3 (4) The services are incidental to a contract for the purchase or
4 lease of real or personal property. Contracts under this criterion,
5 known as “service agreements,” shall include, but not be limited
6 to, agreements to service or maintain office equipment or
7 computers that are leased or rented.

8 (5) The legislative, administrative, or legal goals and purposes
9 cannot be accomplished through the utilization of persons selected
10 pursuant to the regular civil service system. Contracts are
11 permissible under this criterion to protect against a conflict of
12 interest or to insure independent and unbiased findings in cases
13 where there is a clear need for a different, outside perspective.
14 These contracts shall include, but not be limited to, obtaining
15 expert witnesses in litigation.

16 (6) The nature of the work is such that the Government Code
17 standards for emergency appointments apply. These contracts
18 shall conform with Article 8 (commencing with Section 19888) of
19 Chapter 2.5 of Part 2.6.

20 (7) State agencies need private counsel because a conflict of
21 interest on the part of the Attorney General’s office prevents it
22 from representing the agency without compromising its position.
23 These contracts shall require the written consent of the Attorney
24 General, pursuant to Section 11040.

25 (8) The contractor will provide equipment, materials, facilities,
26 or support services that could not feasibly be provided by the state
27 in the location where the services are to be performed.

28 (9) The contractor will conduct training courses for which
29 appropriately qualified civil service instructors are not available,
30 provided that permanent instructor positions in academies or
31 similar settings shall be filled through civil service appointment.

32 (10) The services are of such an urgent, temporary, or
33 occasional nature that the delay incumbent in their implementation
34 under civil service would frustrate their very purpose.

35 (c) All persons who provide services to the state under
36 conditions the board determines constitute an employment
37 relationship shall, unless exempted from civil service by Section
38 4 of Article VII of the California Constitution, be retained under
39 an appropriate civil service appointment.

40 *SEC. 2. Section 19131 of the Government Code is repealed.*

1 ~~19131. Any state agency proposing to execute a contract~~
2 ~~pursuant to subdivision (a) of Section 19130 shall notify the State~~
3 ~~Personnel Board of its intention. All organizations that represent~~
4 ~~state employees who perform the type of work to be contracted,~~
5 ~~and any person or organization which has filed with the board a~~
6 ~~request for notice, shall be contacted immediately by the State~~
7 ~~Personnel Board upon receipt of this notice so that they may be~~
8 ~~given a reasonable opportunity to comment on the proposed~~
9 ~~contract. Departments or agencies submitting proposed contracts~~
10 ~~shall retain and provide all data and other information relevant to~~
11 ~~the contracts and necessary for a specific application of the~~
12 ~~standards set forth in subdivision (a) of Section 19130. Any~~
13 ~~employee organization may request, within 10 days of~~
14 ~~notification, the State Personnel Board to review any contract~~
15 ~~proposed or executed pursuant to subdivision (a) of Section 19130.~~
16 ~~The review shall be conducted in accordance with subdivision (b)~~
17 ~~of Section 10337 of the Public Contract Code. Upon such a~~
18 ~~request, the State Personnel Board shall review the contract for~~
19 ~~compliance with the standards specified in subdivision (a) of~~
20 ~~Section 19130.~~

21 *SEC. 3. Section 19131 is added to the Government Code, to*
22 *read:*

23 *19131. (a) (1) Except as specified in Section 19132, any*
24 *state agency that proposes to execute a personal services contract*
25 *pursuant to Section 19130 shall notify the State Personnel Board*
26 *of its intention to do so before executing the contract.*

27 *(2) The notice described in paragraph (1) shall include all of*
28 *the following:*

29 *(A) A copy of the proposed contract.*

30 *(B) The agency's written justification for the contract, which*
31 *justification shall include a specific description, including*
32 *declarations, that demonstrates that the contract complies with*
33 *Section 19130.*

34 *(b) (1) Upon receiving the notice described in subdivision (a),*
35 *the State Personnel Board shall transmit copies of the items*
36 *contained in the notice to any employee organization that*
37 *represents state employees who perform the types of work*
38 *described in the contract.*

39 *(2) Within 10 days of receiving a notice pursuant to paragraph*
40 *(1), the employee organization may submit a written request to the*

1 *State Personnel Board to have that board determine, in*
2 *accordance with subdivision (b) of Section 10337 of the Public*
3 *Contract Code, whether the proposed contract complies with*
4 *Section 19130 and Article VII of the California Constitution.*

5 *SEC. 4. Section 19132 of the Government Code is repealed.*

6 ~~19132. The State Personnel Board, at the request of an~~
7 ~~employee organization that represents state employees, shall~~
8 ~~review the adequacy of any proposed or executed contract which~~
9 ~~is of a type enumerated in subdivision (b) of Section 19130. The~~
10 ~~review shall be conducted in accordance with subdivision (c) of~~
11 ~~Section 10337 of the Public Contract Code. However, a contract~~
12 ~~that was reviewed at the request of an employee organization when~~
13 ~~it was proposed need not be reviewed again after its execution.~~

14 *SEC. 5. Section 19132 is added to the Government Code, to*
15 *read:*

16 *19132. (a) A state agency may propose or execute a personal*
17 *services contract pursuant to paragraph (10) of subdivision (b) of*
18 *Section 19130 without notifying the State Personnel Board. The*
19 *board nonetheless shall review a personal services contract that is*
20 *proposed or executed pursuant to that paragraph (10), if the board*
21 *receives a request to do so from an employee organization that*
22 *represents state employees that perform the types of work*
23 *described in the proposed or executed contract. The board shall*
24 *conduct its review in accordance with subdivision (b) of Section*
25 *10337 of the Public Contract Code to determine solely whether the*
26 *proposed or executed contract complies with Section 19130 and*
27 *Article VII of the California Constitution.*

28 *(b) Notwithstanding subdivision (c) of Section 10337 of the*
29 *Public Contract Code, a state agency may expend money on a*
30 *contract that has been executed pursuant to paragraph (10) of*
31 *subdivision (b) of Section 19130, even though the contract has not*
32 *been approved by the State Personnel Board. Should the board*
33 *subsequently disapprove a contract executed pursuant to that*
34 *paragraph (10), any individual may bring an action in a court of*
35 *competent jurisdiction to recover for the state's General Fund any*
36 *money paid to the contractor under the contract.*

37 *SEC. 6. Section 10337 of the Public Contract Code is*
38 *repealed.*

39 ~~10337. (a) The State Personnel Board may establish such~~
40 ~~standards and controls over approval of contracts by the~~

~~Department of General Services as are necessary to assure that the approval is consistent with the merit employment principles and requirements contained in Article VII of the California Constitution. The substantive provisions of the standards shall be established at the discretion of the State Personnel Board. The specific procedures for contract review pursuant to such standards shall be established jointly by the board and the department.~~

~~It is the intent of the Legislature that except as provided in this section, the standards and controls established under this subdivision shall not be constructed in such a fashion or construed in such a manner as to authorize the State Personnel Board to establish a separate program for reviewing and approving each and every contract in the place of, or in addition to, the program administered by the Department of General Services pursuant to this article. The State Personnel Board may, when it has reason to believe that a proposed contract is not in compliance with the provisions of Section 19130 of the Government Code, and shall, when requested to do so by an employee organization representing state employees, direct a state agency to transmit the contract to it for review.~~

~~(b) The State Personnel Board shall direct any state agency to transmit to it for review any contract proposed or executed pursuant to subdivision (a) of Section 19130 of the Government Code, if the review has been requested by an employee organization notified pursuant to Section 19131 of the Government Code. The review shall occur prior to any review conducted by the Department of General Services. The board shall restrict its review to the question as to whether the contract complies with the provisions of subdivision (a) of Section 19130 of the Government Code and any additional standards and controls established pursuant to subdivision (a) of this section. The board may disapprove the contract only if it determines that the contract does not comply.~~

~~The board shall delegate the review of such a contract to the executive officer of the board. Within 15 days of its receipt, the executive officer shall notify the employee organization which requested the review whether he or she intends to approve or disapprove it. If the employee organization requests it, the executive officer shall grant the employee organization the opportunity to present its case against the contract and the reasons~~

~~why the contract should be referred to the board for a hearing. Upon a showing of good cause by the employee organization, the executive officer shall schedule the disputed contract for a hearing before the board for the purpose of receiving evidence and hearing arguments concerning the propriety of the disputed contract. In any case, the executive officer shall approve or disapprove the contract or refer it to the board for a hearing within 30 days of its receipt. The reasons for a decision by the executive officer, or the board, approving or disapproving the contract shall be stated in writing.~~

~~(e) A contract proposed or executed pursuant to subdivision (b) of Section 19130 of the Government Code shall be reviewed by the State Personnel Board if the board receives a request to conduct such a review from an employee organization representing state employees. Any such review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code. The board shall delegate the review of such a contract to the executive officer of the board. If the employee organization requests it, the executive officer shall grant the employee organization the opportunity to present its case against the contract and the reasons why the contract should be referred to the board for a hearing. Upon a showing of good cause by the employee organization, the executive officer shall schedule the disputed contract for a hearing before the board for the purpose of receiving evidence and hearing arguments concerning the propriety of the disputed contract. The executive officer shall approve or disapprove the contract or refer it to the board for a hearing within 30 days of its receipt. The reasons for the decision by the executive officer, or the board, approving or disapproving the contract shall be stated in writing.~~

~~(d) Contracts subject to State Personnel Board review under this section shall not become effective unless and until approval is granted.~~

SEC. 7. Section 10337 is added to the Public Contract Code, to read:

10337. (a) The State Personnel Board is solely responsible for determining whether a personal services contract that has been proposed or executed by a state agency complies with Section 19130 of the Government Code and Article VII of the California Constitution. The board and the Department of General Services

1 shall jointly establish the procedures for making these
2 determinations.

3 (b) (1) If the board has reason to believe that a proposed or
4 executed personal services contract does not comply with Section
5 19130 of the Government Code and Article VII of the California
6 Constitution, or when an organization that represents state
7 employees that performs the types of work described in the
8 contract requests board review pursuant to Section 19131 or
9 19132 of the Government Code, the board shall direct the state
10 agency that is or will be a party to the contract to transmit the
11 proposed or executed contract to the board for review.

12 (2) The board shall review the proposed or executed contract
13 solely to determine whether the contract complies with Section
14 19130 of the Government Code and Article VII of the California
15 Constitution and shall, in writing, approve or disapprove the
16 contract on this basis. To assist the board in making this
17 determination, the state agency that has executed the contract, or
18 that is proposing to execute the contract, has the burden of proof
19 to demonstrate that the contract complies with Section 19130 of
20 the Government Code and Article VII of the California
21 Constitution.

22 (3) The board may review a proposed or executed personal
23 services contract either before or after the Department of General
24 Services has reviewed that contract.

25 (4) The board may delegate the review of a proposed or
26 executed personal services contract to the board's executive officer
27 only if the officer's determination may be appealed to the board by
28 the state agency or the employee organizations that represent state
29 employees that perform the types of work described in the personal
30 services contract. If the executive officer reviews the contract
31 pursuant to this paragraph, the determination of whether the
32 contract complies with Section 19130 of the Government Code and
33 Article VII of the California Constitution shall be made in writing.

34 (c) If a personal services contract is subject to review by the
35 board pursuant to Section 19131 of the Government Code, a state
36 agency may not expend money on that contract and no work may
37 be performed under that contract until the board has approved or
38 disapproved of the contract.

39 (d) It is the intent of the Legislature that, except as provided in
40 this section, the board may not establish a separate program for

1 *reviewing and approving personal services contracts in the place*
2 *of, or in addition to, the program administered by the Department*
3 *of General Services pursuant to this article.*

4 ~~amended to read:~~

5 ~~19131. — Any state agency that proposes to execute a contract~~
6 ~~pursuant to subdivision (a) of Section 19130 shall notify the State~~
7 ~~Personnel Board of its intention. All organizations that represent~~
8 ~~state employees who perform the type of work to be contracted,~~
9 ~~and any person or organization that files a request for notice with~~
10 ~~the State Personnel Board, shall be contacted immediately by the~~
11 ~~board upon receipt of this notice so that they may be given a~~
12 ~~reasonable opportunity to comment on the proposed contract.~~
13 ~~Departments or agencies submitting proposed contracts shall~~
14 ~~retain and provide all data and other information relevant to the~~
15 ~~contracts and necessary for a specific application of the standards~~
16 ~~set forth in subdivision (a) of Section 19130. Any employee~~
17 ~~organization may request the State Personnel Board, within 10~~
18 ~~days of receipt of the notification, to review any contract proposed~~
19 ~~or executed pursuant to subdivision (a) of Section 19130. The~~
20 ~~review shall be conducted in accordance with subdivision (b) of~~
21 ~~Section 10337 of the Public Contract Code. The State Personnel~~
22 ~~Board shall review the contract for compliance with the standards~~
23 ~~specified in subdivision (a) of Section 19130.~~

24 ~~SEC. 2. — Section 19132 of the Government Code is repealed.~~